

1 Mark Ankcorn (SBN 166871)
2 ANKCORN LAW FIRM
3 9845 Erma Road, Suite 300
4 San Diego, California 92131
5 (619) 870-0600
6 *mark@markankcorn.com*

7 Beth Terrell (SBN 178181)
8 TERRELL MARSHALL DAUDT & WILLIE, PLLC
9 936 North 34th Street, Suite 400
10 Seattle, Washington 98103
11 (206) 816-6603
12 *bterrell@tmdwlaw.com*

13 Attorneys for Plaintiffs

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

11 SANDRA RAMIREZ and SCOTT
12 FOWLER, on behalf of themselves and all
13 others similarly situated,

14 Plaintiffs,

15 v.

16 BANK OF AMERICA, N.A.,

17 Defendant.

Case No. '11CV2008 LAB POR

CLASS ACTION

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF PURSUANT TO THE
TELEPHONE CONSUMER PROTECTION
ACT 47 U.S.C. § 227**

Jury Trial Demanded

INTRODUCTION

1. Sandra Ramirez and Scott Fowler ("Plaintiffs") bring this class action for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of Defendant BANK OF AMERICA, N.A. ("BANA" or "Defendant") in negligently, knowingly, and willfully contacting Plaintiffs on their cellular telephones without their express prior consent, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). Plaintiffs allege as follows upon personal knowledge as to themselves and their own acts and as to all other matters alleges upon information and belief.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1332, because Plaintiffs seek up to \$1,500 for each call in violation of the TCPA which when aggregated among a proposed class number in the tens of thousands exceeds the \$5,000,000 threshold. Plaintiffs allege a national class, which will result in at least one class member belonging to a different state than that of Defendant. Accordingly, both elements of diversity jurisdiction under the Class Action Fairness Act of 2005 are present. Venue is proper in the United States District Court for the Southern District of California as Defendant resides within the district.

PARTIES

3. Sandra Ramirez and Scott Fowler are natural persons residing in California. Sandra Ramirez and Scott Fowler are account holders of cellular telephone numbers and pursuant to the terms of their respective contracts are charged for each call within the meaning of 47 U.S.C § 227(b)(1)(A)(iii).

4. Defendant Bank of America, N.A. is a national banking association chartered by the Comptroller of the Currency of the U.S. Treasury under the National Bank Act. BANA makes loans to consumers and business directly and via other affiliated entities. BANA services millions of consumer debts such as mortgage home loans and credit cards. According to its parent corporation's most recent financial report, BANA is the largest mortgage loan servicer in the United States, servicing 13.4 million loans. BANA has its main office at 100 North Tryon Street, Charlotte, North Carolina, and operates in every state including California through approximately 5900 retail banking centers, 750 retail home loan locations, and 70 operations centers.

FACTUAL ALLEGATIONS

5. Plaintiff Sandra Ramirez and her husband borrowed money to purchase a home in California in August, 2008, and began making regular, timely payments in full each month to BANA, the servicer of their mortgage through its predecessor entity BAC Home Loans Servicing,

1 LP.

2 6. BAC Home Loans Servicing, LP was a Texas limited partnership. Its limited partner
3 was BANA LP, LLC, and its general partner was BAC GP LLC, both Nevada limited liability
4 companies. The sole member of BANA LP LLC and BAC GP LLC was Defendant Bank of
5 America, N.A. ("BANA"). On December 30, 2010, BAC Home Loans Servicing, LP ceased doing
6 business under its own name and was merged into its parent company, BANA. BAC Home Loans
7 Servicing, LP's predecessor entities include Countrywide Home Loans Servicing, LP.

8 7. When Mr. and Mrs. Ramirez fell behind on their mortgage, BANA began a
9 campaign of harassment by telephone in an effort to collect on the missed payments. BANA would
10 call their home and Mrs. Ramirez' personal cell phone in sequence at multiple times per day.

11 8. Plaintiff Scott Fowler and his wife purchased their home in October, 2006, taking out
12 a loan in Mrs. Fowler's name only. They made regular, timely payments in full each month to
13 BANA, the servicer of their mortgage through its predecessor entity BAC Home Loans Servicing,
14 LP.

15 9. When Mr. and Mrs. Fowler fell behind on their mortgage, BANA began a campaign
16 of harassment by telephone in an effort to collect on the missed payments. BANA would call their
17 home and Mr. Fowler's personal cell phone in sequence at multiple times per day.

18 10. Through its subsidiaries and agents, Defendant employs thousands of persons at call
19 centers throughout the country and overseas. These calling centers use automatic telephone dialing
20 systems and computerized account information to track, record, and maintain the millions of
21 consumer debts serviced by BANA.

22 11. In 1991, Congress enacted the TCPA in response to a growing number of consumer
23 complaints regarding certain telemarketing and debt collection practices. The TCPA regulates, *inter*
24 *alia*, the use of automated dialing systems. Specifically, section 227(b)(1)(A)(iii) prohibits the use
25 of autodialers to make any call to a wireless number in the absence of an emergency or the prior
26 express consent of the called party.

27 12. 47 U.S.C. § 227(b) states in pertinent part:
28

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

- (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice— . . .
- (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

- (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
- (B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or
- (C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than three times the amount available under subparagraph (B) of this paragraph.

13. According to findings by the Federal Communication Commission (“FCC”), the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

14. On January 4, 2008, the FCC issued a Declaratory Ruling confirming that autodialed and prerecorded message calls to a wireless number by a creditor or on behalf of a creditor are permitted only if the calls are made with the “prior express consent” of the called party. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (“FCC Declaratory Ruling”), 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43 Communications Reg. (P&F) 877, 2008 WL65485 (F.C.C.) (2008).

15. The FCC “emphasize[d] that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was

1 provided during the transaction that resulted in the debt owed.” *FCC Declaratory Ruling*, 23
2 F.C.C.R. at 564-65 (¶10).

3 16. Under the TCPA and pursuant to the FCC’s January 2008 Declaratory Ruling, the
4 burden is on Defendant to demonstrate that Plaintiffs gave BAC their express consent to call their
5 cell phones within the meaning of the statute. *See FCC Declaratory Ruling*, 23 F.C.C.R. at 565 (¶
6 10).

7 17. Plaintiff Scott Fowler never provided his cellular telephone number to Defendant at
8 any time, nor did he give his express consent to receive calls on his cellular telephone. He was not
9 listed on his wife’s mortgage application, which was in her name only.

10 18. Plaintiff Sandra Ramirez originally provided her cellular telephone number to
11 Defendant at some point after the consummation of the transaction which resulted in the debt owed,
12 but when Defendant began its campaign of telephone harassment, she withdrew that consent by
13 repeatedly telling Defendant’s collection agents to stop calling her.

14 19. Plaintiff Sandra Ramirez on at least four occasions verbally instructed collection
15 agents working on BAC’s behalf to stop calling her cell phone. Each one stated that it was not
16 possible for them to remove her number from the computer system and Defendant continued to
17 make calls to her cell phone.

18 20. Defendant acted willfully or knowingly or both in calling numbers using an
19 autodialer without regard to the TCPA or whether the number was assigned to a cellular telephone.

20 21. At least 54 calls were placed by Defendant or their representatives, contractors, or
21 agents, to Mrs. Ramirez’ cellular telephone using an automatic telephone dialing system. A similar
22 volume of calls was made by Defendant to Mr. Fowler’s cellular telephone.

23 22. Many, if not most, of these calls used an artificial or pre-recorded voice to leave a
24 message or give instructions.

25 23. In calling Plaintiffs on their cellular telephone lines dozen of time at multiple times
26 per day, Bank of America violated 47 U.S.C. § 227(b).

27 ///

Class Action Allegations

24. Plaintiffs bring this class action pursuant to Federal Rule of Civil Procedure 23 on behalf of themselves and on behalf of all others similarly situated.

25. The proposed Class that Plaintiffs seek to represent is defined as follows:

All persons within the United States who, on or after September 1, 2007, received a non-emergency telephone call from Defendant to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice and who did not provide prior express consent for such calls during the transaction that resulted in the debt owed.

26. Collectively, these persons will be referred to as "Class members." Plaintiff represents, and is a member of, the Class. Excluded from the Class are Defendants and any entities in which BANA or its subsidiaries have a controlling interest, Defendant's agents and employees, the judicial officer to whom this action is assigned and any member of the court staff and immediate family, and claims for personal injury, wrongful death, and emotional distress.

27. Plaintiffs do not know the exact number of members in the Class, but based upon BANA's representations as to its market share in the United States, Plaintiffs reasonably believe that Class members number at minimum in the hundred thousands. This Class size includes consumers holding credit cards issued by BANA under any of its subsidiary brands and affiliates, as well as persons who co-signed for such credit cards; consumer and business loans serviced by BANA or its affiliates; home mortgages borrowers and guarantors, and all other persons whom Defendant or its affiliates dialed (or mis-dialed).

28. There are questions of law and fact common to the members of the Class that predominate over any questions affecting only individual members, including, whether Defendant made any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, in violation of the TCPA.

29. Plaintiffs' claims are typical of the claims of the members of the Class. Plaintiffs

1 have no interests antagonistic to those of the Class, and Defendant has no defenses unique to
2 Plaintiffs.

3 30. Plaintiffs will fairly and adequately protect the interests of the Class, and have
4 retained attorneys experienced in class and complex litigation.

5 31. A class action is superior to all other available methods for the fair and efficient
6 adjudication of this controversy for the following reasons:

7 a. It is economically impractical for members of the Class to prosecute individual
8 actions;

9 b. The Class is readily definable; and

10 c. Prosecution as a class action will eliminate the possibility of repetitious litigation.

11 32. A class action will cause an orderly and expeditious administration of the claims of
12 the Class. Economies of time, effort, and expense will be fostered and uniformity of decisions will
13 be ensured.

14 33. Plaintiffs do not anticipate any undue difficulty in the management of this action.

15
16 **FIRST CLAIM FOR RELIEF**
Negligent Violations of the TCPA

17 34. Plaintiffs re-allege and incorporate by reference the above paragraphs as though set
18 forth fully herein.

19 35. The foregoing act and omissions of BANA constitute numerous and multiple
20 violations of the TCPA, including but not limited to each of the above-cited provisions of 47 U.S.C.
21 § 227 *et seq.*

22 36. As a result of BANA's negligent violations of the TCPA, Plaintiffs and Class
23 members are entitled to an award of \$500 in statutory damages for each and every call placed in
24 violation of the statute, pursuant to 47 U.S.C. § 227(b)(3)(B).

25 37. Plaintiffs and all Class members are also entitled to and do seek injunctive relief
26 prohibiting such conduct violating the TCPA by BAC in the future.

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SECOND CLAIM FOR RELIEF

Knowing or Willful Violations of the TCPA

38. Plaintiffs re-allege and incorporate by reference the above paragraphs as though set forth fully herein.

39. The foregoing acts and omissions of BANA constitute numerous and multiple knowing or willful, or both, violations of the TCPA, including but not limited to each of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

40. As a result of BANA's knowing and willful violations of the TCPA, Plaintiffs and each member of the Class are entitled to treble damages of up to \$1,500 for each and every call in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3).

41. Plaintiffs and Class members are also entitled to and do seek injunctive relief prohibiting such conduct violating the TCPA by BANA in the future.

JURY TRIAL DEMAND

42. Plaintiffs and Class members request a trial by jury on each of the claims for relief stated herein.

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PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that judgment be entered against Defendant Bank of America, N.A., for the following:

1. An injunction against the calling of cellular telephones by BANA's call centers, except where the cellular telephone subscriber has provided prior express consent to the calls;
2. Damages pursuant to 47 U.S.C. § 227(b)(3);
3. Costs of litigation and reasonable attorneys' fees;
4. Such other and further relief as the court may deem just and proper.

DATED: August 31, 2011

ANKCORN LAW FIRM

By: /s/ Mark Ankcorn
Mark Ankcorn

TERRELL MARSHALL DAUDT & WILLIE PLLC

By: /s/ Beth Terrell
Beth Terrell

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Sandra Ramirez and Scott Fowler

(b) County of Residence of First Listed Plaintiff Riverside, CA

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Ankorn Law Firm, 9845 Erma Road, Suite 300
San Diego, California 92131 (619) 870-0600

DEFENDANTS

Bank of America, N.A.

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

'11CV2008 LAB POR

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input checked="" type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statutes under which you are filing. (Do not cite jurisdictional statutes unless diversity):

47 USC § 227 - 28:1332 - Diversity (jmd)

Brief description of cause:

Telephone Consumer Protection Act, robo-calls to cell phone without prior express permission

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ 250,000,000

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

August 31, 2011

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____